

1 KIMMEL & SILVERMAN, P.C.

2 Joseph D. Steward, III (337385)
3 1055 West 7th Street, 33rd Floor
4 Los Angeles, California 90017
5 Telephone: 215-540-8888 x 134
6 Facsimile: 215-540-8817
7 jsteward@creditlaw.com

8 Craig T. Kimmel, Esq. (*pro hac vice*)
9 Jacob U. Ginsburg, Esq. (*pro hac vice*)
10 30 E. Butler Ave.
11 Ambler, Pennsylvania 19002
12 kimmel@creditlaw.com
13 jginsburg@creditlaw.com
14 teamkimmel@creditlaw.com

15 BUTSCH ROBERTS & ASSOCIATES LLC

16 Christopher E. Roberts (*pro hac vice*)
17 231 S. Bemiston Avenue, Suite 260
18 Clayton, Missouri 63105
19 Phone: (314) 863-5700
20 Fax: (314) 863-5711
21 CRoberts@butschroberts.com
22 *Attorneys for Plaintiff*

23 NOLAN HEIMANN LLP

24 Jordan Susman, Esq. (SBN 246116)
25 Margo Arnold, Esq. (SBN 278288)
26 16000 Ventura Boulevard, Suite 1200
27 Encino, California 91436
28 Telephone: (818) 574-5710
Facsimile: (818) 574-5689
jsusman@nolanheimann.com
marnold@nolanheimann.com
Attorneys for Defendants

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

) Case No.: 2:21-cv-01997-JAM-AC
KRISTEN HALL, individually, and on)
behalf of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
SMOSH DOT COM, INC. d/b/a) **JOINT STATUS REPORT**
SMOSH and MYTHICAL)
ENTERTAINMENT, LLC)
)
Defendants.)
_____)

I. Introduction

Plaintiff, Kristen Hall (“Plaintiff”) and Defendants Smosh Dot Com, Inc. d/b/a Smosh and Mythical Entertainment, LLC (collectively, “Defendants”) jointly submit this report in accordance with Rule 26(f) of the Federal Rules of Civil Procedure.

II. Content and Parties’ Responsibilities [Rule 26(f)(2)]

The parties engaged in the Rule 26(f) meeting and discussed the content of Rule 26(f)(2) including (a) the nature and basis of their respective claims and defenses; (b) possibilities for promptly settling or resolving the case; (c) the timing of the disclosures under Rule 26(a)(1); (d) any issues about preserving discoverable information; and (e) developing a proposed discovery plan.

1 **III. Joint Report**

2 **A. The nature of the case**

3 **Plaintiff:**

4
5 This is a Telephone Consumer Protection Act 47 U.S.C. § 227, *et seq.* and Texas
6 Business and Commerce Code § 302.101 *et seq.* class-action in which Plaintiff
seeks to represent similarly situated individuals.

7 Defendants Smosh and Mythical both knowingly telemarket to minors, who lack
8 the capacity to consent to receive telemarketing calls under the laws of California.
9 The Defendants' terms and conditions dictate that California law shall apply.
10 Here, the Defendants claim to have consent to telemarket to Ms. Hall's cell phone
11 from receiving a purported online submission from her minor son when he was 13
12 years old. A minor lacks the capacity to enter such a contractual relationship. If
13 subscribers to telephone plans receive texts from Defendants based on a purported
"consent" from a person of minority age, the affirmative defense of "express
written consent" cannot be met.¹

14 Plaintiff seeks to represent sub-classes for persons whose numbers were on the
15 Do Not Call registry for over 31 days and received telemarketing calls or texts
16 without valid consent and known-residents of Texas who received solicitation calls
or texts without a business relationship or permission because the Defendants
failed to register as a telephone solicitor with the Texas Secretary of State.

17 **Defendants**

18
19 This is a Telephone Consumer Protection Act 47 U.S.C. § 227, *et seq.* and Texas
20 Business and Commerce Code § 302.101 *et seq.* class-action which Plaintiff is
21 bringing despite the fact that (i) Plaintiff is not the user of the cell phone number at
issue and (ii) the user of the cell phone-number, Plaintiff's teenage son, legally
consented to receive marketing text messages from Defendants.

22
23

¹ After the Amended Complaint was filed, the Ninth Circuit issued the decision *Meier v. Allied*
24 *Interstate LLC*, No. 20-55286, 2022 U.S. App. LEXIS 1413 (9th Cir. Jan. 19, 2022) which
25 Plaintiff reads to have rejected the theory that a predictive dialer can be an "automatic telephone
26 dialing system" under 47 U.S.C. § 227(b). Plaintiff therefore will not proceed with that claim
and is in discussions with counsel for the Defendants as to the procedural mechanism by which
that claim will be formally abandoned (i.e. stipulation, second amended complaint, etc.)

1 The operative complaint omitted and misstated facts that would have exonerated
2 Defendants. For example, the operative complaint falsely alleges that Plaintiff was
3 the user of the cell phone number and that her permission is somehow required for
4 text messages to be sent to the cell phone number because those are elements
5 required of a Telephone Consumer Protection Act 47 U.S.C. § 227, *et seq.* claim.

6 **B. Progress in the service of process**

7 All defendants have been properly served.

8 **C. Possible joinder of additional parties**

9 The parties do not anticipate joining any additional parties at this time, but reserve
10 the right to add and/or join parties as warranted in the course of litigation.

11 **D. Any Expected or Desired Amendment of Pleadings**

12 The parties do not anticipate further amendments at this time. The parties request a
13 deadline of

14 **E. Jurisdiction and venue**

15 This Court has original subject matter jurisdiction over this matter pursuant to 28
16 U.S.C. § 1331, which grants this Court original jurisdiction of all civil actions
17 arising under the laws of the United States. Further, this Court has subject matter
18 jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A), because this case is a class
19 action where the aggregate claims of all members of the proposed Class are in the
20 excess of \$5,000,000.00, exclusive of interest and costs. This Court also has
21 supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. §
22 1367. This Court has personal jurisdiction over Defendants and venue is proper.

23 **F. Anticipated Motions and the Scheduling of Motions**

24 **1. Plaintiff**

25 Plaintiff anticipates filing a motion for class certification. In the event that
26 the Defendants continue attaching and citing settlement communications to
27 pleadings where such communications are not germane, Plaintiff intends to file a
28

1 motion to strike. Plaintiff is hopeful the parties can reach an agreement where the
2 Defendants comply with FRE 408 while still presenting a robust and vigorous
3 defense.

4 5 **2. Defendants**

6 Defendants have filed a Motion for Sanctions pursuant to Federal Rule of
7 Civil Procedure 11 and will file a Motion to Dismiss. Should the Motion to
8 Dismiss not be granted in its entirety, Defendants anticipate filing a motion for
9 summary judgment.

10 **G. Anticipated discovery and the scheduling of discovery, including:**

11 (1) What changes, if any, should be made in the timing, form, or requirement for
12 disclosures under Rule 26(a), including a statement as to when disclosures
13 under Rule 26(a)(1) were made or will be made;

14 The Parties will exchange Rule 26(a)(I) Initial Disclosures **by April 15,**
15 **2022.** The Parties agreed that no other changes should be made to the form or
16 requirement for disclosures under Rule 26(a).

17 (2) The subjects on which discovery may be needed, when discovery should be
18 completed, and whether discovery should be conducted in phases or be
19 limited to or focused upon particular issues;

20 **Plaintiff:** Discovery will be needed on the allegations made in Plaintiff's
21 Complaint and any responsive pleading filed by Defendants. Plaintiff also seeks
22 discovery on class information relating to the identities of class-members. The
23 Parties anticipate they will conduct discovery primarily through interrogatories,
24 requests for production, requests for admissions, depositions and subpoenas for
25 documents and information. Plaintiff does not believe discovery should be
26 completed in phases.

27 **Defendants:**

28 Discovery will be needed on the allegations made in Plaintiff's Complaint
and any responsive pleading filed by Defendants. Defendants anticipate they will

1 conduct discovery primarily through interrogatories, requests for production,
2 requests for admissions, depositions and subpoenas for documents and
3 information. Defendant does not believe discovery should be completed in phases.

4 (3) What changes, if any, should be made in the limitations on discovery
5 imposed under the Civil Rules and what other limitations, if any, should be
6 imposed; and

7 The parties do not request any changes.

8 (4) The timing of the disclosure of expert witnesses and information required by
9 Rule 26(a)(2).

10 The parties shall designate experts before the discovery end date.

11 **H. Future proceedings, including setting appropriate cut-off dates for**
12 **discovery, law and motion, and the scheduling of pretrial and trial;**

13 Discovery End Date: **December 9, 2022**

14 Expert Discovery End Date: **February 1, 2023**

15 Dispositive Motion Deadline: **March 15, 2023**

16 Motion for Class Certification Deadline: **On or before January 26, 2023**

17 Opposition to Motion for Class Certification: **28 days after the filing of the**
18 **Motion for Class Certification**

19 Reply in Support of Class Certification: **14 days after the filing opposition**
20 **to class certification**

21 Pre-trial and Trial: **A reasonable trial date is difficult to ascertain due to**
22 **uncertainties related to class certification and notice.**

23 **I. Appropriateness of special procedures;**

24 Not applicable.

25 **J. Estimate of Trial Time**

26 The parties request a jury trial and anticipate that a trial will take three to
27 five days.

1 **K. Modification of standard pretrial procedures specified by the rules due**
2 **to the relative simplicity or complexity of the action or proceedings**

3 This case constitutes complex litigation because it is a class and
4 representative action. However, the Parties do not seek modification of standard
5 pretrial procedures at this time, other than as proposed in this report.

6 **L. Whether the case is related to any other case, including any matters in**
7 **bankruptcy.**

8 Parties to this joint report are not aware of any actions previously filed or
9 concurrently pending in the Eastern District which (a) involve the same parties and
10 are based on the same or similar event; (b) involve the same property, transaction,
11 or event; (c) involve similar questions of fact and the same question or law; or (d)
12 for any other reasons, would entail duplication of labor if actions were heard by
13 different Judges or Magistrate Judges.

13 **M. Whether a settlement conference should be scheduled**

14 **Plaintiff:**

15 Plaintiff believes the prospect of settlement will be maximized after this
16 action reaches the post-certification stage. However, Plaintiff proposes mediation
17 sometime in **November of 2022** if the case is not settled at that point.

18 **Defendants:** Defendants believe the prospect of settlement will diminish
19 after this action reaches the post-certification stage. Defendants propose mediation
20 sometime in **November 2022** if the case is not settled at that point.

21
22 Respectfully submitted,

23
24 Dated: April 5, 2022

KIMMEL & SILVERMAN, P.C.

25 By: /s/ Joseph D. Steward, III
26 Joseph D. Steward, III, Esq. (337385)

1 1055 West 7th Street, 33rd Floor
2 Los Angeles, California 90017
3 Phone: 215-540-8888
4 Facsimile: 877-788-2864
5 Email: jsteward@creditlaw.com

6
7 */s/ Craig T. Kimmel*
8 Craig T. Kimmel (pro hac vice)
9 */s/ Jacob U. Ginsburg*
10 Jacob U. Ginsburg (pro hac vice)
11 30 E. Butler Ave.
12 Ambler, Pennsylvania 19002
13 kimmel@creditlaw.com
14 jginsburg@creditlaw.com
15 teamkimmel@creditlaw.com

16 BUTSCH ROBERTS & ASSOCIATES LLC

17 */s/ Christopher E. Roberts*
18 Christopher E. Roberts, Esq. (pro hac vice)
19 231 S. Bemiston Avenue, Suite 260
20 Clayton, Missouri 63105
21 Phone: (314) 863-5700
22 Fax: (314) 863-5711
23 CRoberts@butschroberts.com
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25 NOLAN HEIMANN LLP

26 */s/ Jordan Susman*
27 Jordan Susman, Esq. (SBN 246116)
28 Margo Arnold, Esq. (SBN 278288)
16000 Ventura Boulevard, Suite 1200
Encino, California 91436
Telephone: (818) 574-5710
Facsimile: (818) 574-5689

jsusman@nolanheimann.com
marnold@nolanheimann.com
Attorneys for Defendants